

STATE OF CALIFORNIA

**Energy Resources Conservation
and Development Commission**

In the Matter of:)	Docket No. 98-SIT-2
)	
Blythe Energy, LLC)	COMMITTEE PROPOSED DECISION
Petition for Jurisdictional Determination)	
)	
_____)	

I. PROCEDURAL HISTORY

On July 22, 1998, Blythe Energy, LLC (Petitioner) filed a "Petition for Jurisdictional Determination" under Public Resources Code (PRC) section 25540.6. Petitioner requests the Commission to determine whether the Blythe Energy Powerplant Project¹ is exempt from the Notice of Intention (NOI) requirements of PRC, § 25502. Petitioner asserts that its merchant project is a market-based response to the creation of the California Power Exchange (PX) which solicits electricity bids on an hourly basis. The proposed project will be operated in the competitive electricity marketplace to sell all or some of its output to the PX.

By Notice dated August 18, 1998, the Energy Facility Siting Committee (Committee) scheduled a hearing on September 14, 1998 to consider the Petition. Upon Petitioner's request, the Hearing was rescheduled and held on September 29, 1998. In accord with Commission regulations,² the Committee served the Notice and Petition upon the individuals, organizations, and businesses

¹ Blythe Energy proposes to construct and operate a nominally rated 400 MW natural gas-fired combined cycle powerplant, which will be located near the City of Blythe in Riverside County, a few miles west of the California-Arizona border. (Exhibit 2, pp. 8-9; [Exhibits are listed in Appendix A attached hereto]).

² Cal. Code of Regs., tit. 20, § 1232.

identified as "interested parties" in the Petition, as well as upon other persons and entities appearing on other pertinent mailing lists.

The Notice directed all entities wishing to participate in the proceeding to file written statements by September 8, 1998. The Notice also directed Petitioner to provide responses to several inquiries regarding its assertion that the proposed project is the result of a "competitive solicitation or negotiation." Petitioner requested an extension of one day to file its responses and submitted them on September 9. Commission Staff filed its statement on September 8.

At the September 29 hearing, both Petitioner and Staff provided oral and written testimony and other evidence that was admitted into the record. No one present objected to the testimony or offered countervailing evidence. Staff agreed with Petitioner's assertions that the proposed project is a market-based response to the PX and is eligible for an exemption from the NOI process.

On October 21, 1998, the Committee issued this Proposed Decision which is based on the written statements filed prior to the hearing and on the testimony presented at the hearing. The Committee also issued a Notice that the full Commission would consider the Proposed Decision at its regularly scheduled Business Meeting on November 4, 1998.

II. APPLICABLE LAW

A. Statutory Requirements.

Public Resources Code section 25502 provides in pertinent part that:

Each person proposing to construct a thermal powerplant...shall submit to the commission a notice of intention to file an application for the certification of the site and related facility or facilities.³

³ The Commission generally has 12 months from the time an NOI filing is accepted in which to conduct this review. (PRC, § 25516.6(a).)

The purpose of the Notice of Intention (NOI) requirements, which is explained in the Commission's regulations, is to provide an open planning process in which the applicant, interested agencies, and members of the public have the opportunity to review the principal environmental, public health and safety, socioeconomic, and technological advantages and disadvantages of potential sites for a proposed project. (Cal. Code of Regs., tit. 20, § 1721). The NOI process also addresses the issue of whether a proposed project is needed under the Commission's assessment of electricity demand adopted pursuant to Section 25305 et seq. of the Public Resources Code. (PRC, § 25502).

Successful completion of the NOI process, which would include approval of at least two specific site locations and a preliminary determination of need, is generally a prerequisite to the second stage of powerplant licensing, i.e., the Application for Certification (AFC). Public Resources Code section 25540.6, however, exempts certain projects from the NOI process and allows them to proceed directly to the AFC stage.⁴ Projects eligible for this expedited licensing process include:

...a thermal powerplant which is the result of a competitive solicitation or negotiation for new generation resources and will employ natural gas-fired technology... (PRC, § 25540.6(a)(1).)

Petitioner contends its proposed project fits within this provision.

B. Policy Guidance.

The Commission has authority to interpret pertinent statutory or regulatory provisions.

⁴ In this instance, the Commission must issue a *final* licensing decision within 12 months (PRC, § 25540.6(a).)

Typically, such Commission policy is expressed in the biennial Electricity Report (*ER*), the most recently adopted of which is controlling for powerplant proposals filed during an *ER*'s operative life. (PRC, §§ 25309 and 25523(f)). In the present instance, this guidance appears as part of the 1996 *ER* in which the Commission stated:

For gas-fired powerplants which are the result of competitive solicitations or negotiations, we will continue our process for granting exemptions from NOI requirements to such projects. (*ER* 96, p. 75, Endnote 1).

The policy expressed in *ER* 96 is consistent with the views contained in *ER* 94 and the Addendum to *ER* 94 supporting the development of a competitive market in the production and sales of electricity. Moreover, there is no indication in *ER* 96 that the Commission intends to evaluate NOI exemptions differently than they were evaluated under *ER* 94.

In the Addendum to *ER* 94,⁵ the Commission clarified "...its policy regarding the eligibility of natural gas-fired plants for an exemption from the Notice of Intention (NOI) under Public Resources Code section 25540.6(a)(1)."⁶ It should be noted that the Addendum was drafted in response to legislation that amended Section 25540.6 of the Public Resources Code by, *inter alia*, repealing previous requirements that limited the NOI exemption to cogeneration projects under 300 MW and also adding the provisions allowing NOI exemptions for natural gas-fired projects that are "the result of a competitive solicitation or negotiation." (AB 1884; Statutes of 1993). The Legislative Counsel's Digest for AB 1884 states that the amendment was intended to change

⁵ The Commission unanimously adopted the "Addendum to *ER* 94" (Docket No. 93-ER-94) on February 14, 1996 (Order No. 96-0214-09).

⁶ *ER* 94 Addendum, Revision 1, p. 1.

the statute to conform to the present-day competitive marketplace of energy development.⁷

In the *ER 94* Addendum, the Commission stated that AB 1884 "...reflects the...view that the 12-month period for an NOI should not hamper or delay the development of competing natural gas-fired powerplants."⁸

In concert with this statement, the Commission expressed its preference for a "...broad construction of what it means to be 'the result of a competitive solicitation or negotiation'."⁹ This preference includes the specific direction that "...it is appropriate to consider realistically the many forms that competitive solicitations and negotiations are likely to take in a competitive electricity market."¹⁰ The Commission offered further guidance by providing examples of actions constituting a "competitive solicitation":

For example, a 'competitive solicitation' may be conducted not only by a utility, but also by organized pools of consumers. Similarly, what results from 'negotiation' may cover a variety of negotiated situations ranging from a project with a traditional power purchase agreement to one offering to sell into an

⁷ "...[T]he siting provisions of the Act were written at a time when large baseload powerplants were the types of plants being considered by the Commission and when competition between utilities and second party power producers was nonexistent." (Leg. Counsel's Digest, Bill Analysis for AB 1884, Third Reading, April 12, 1993). At the time AB 1884 was adopted, the federal Public Utilities Regulatory Policy Act (PURPA) and other related state laws had established a process (Biennial Plan Report Update or BRPU) to allow regulated public utilities and independent power producers to compete in the marketplace through a competitive bid process in order to meet demand. (*Ibid.*) The purpose of AB 1884 was to streamline the siting of projects selected by a competitive mechanism while preserving the Commission's ability to ensure that only "needed" projects are certified. (*Id.*, 8/27/93 Senate Analysis).

⁸ *ER 94* Addendum, Revision 1, p. 2.

⁹ *Ibid.*

¹⁰ *Ibid.*

established power pool on a real-time basis.¹¹

The Commission also announced that requests for an NOI exemption will be considered on a case-by-case basis, through the investigation process already existing in the regulations.¹² Based on this policy, the Commission has previously determined on a case-by-case basis that five proposed merchant powerplant projects are exempt from NOI requirements.¹³

The second major element of policy guidance provided by *ER 94* regarding the impact of AB 1884 concerns the integrated assessment of need determination that has typically been addressed in the Commission's Electricity Reports. In this regard, the Commission stated:

We regard AB 1884 as an important change in the philosophy underlying the requirement of need conformance, in which the Legislature has indicated that the forces of competition are an adequate (and perhaps superior) alternative to governmental attempts to determine what is in the best interests of ratepayers. (*ER 94*, p. 133).

In *ER 96*, the Commission continued the essence of *ER 94*'s hands-off approach for proposed powerplants that do not put ratepayers at financial risk, and simplified the "need conformance" test to encourage the development of powerplant projects in the newly emerging competitive

¹¹ *Id.*, pp. 2-3. This policy logically anticipates the PX which was created by AB 1890 (Stats. 1996) to serve as the clearinghouse for the competitive market by providing an "efficient competitive auction open ...to all suppliers" (Pub. Util. Code, § 355).

¹² *Id.*, p. 3; see Cal. Code of Regs., tit. 20, §§ 1230-36.

¹³ Otay Mesa (Order No. 96-1211-6); High Desert (Order No. 97-0305-04); Calpine (Order No. 97-0625-02); Sunlaw Cogeneration Partners I (Order No. 97-1105-02); and La Paloma (Order No. 98-0812-04). In four of those proceedings, the petitioners submitted letters of intent indicating evidence of negotiations to sell power directly to wholesale or retail power markets. In *La Paloma*, the Commission found that the PX is a continuous series of negotiations and solicitations such that a merchant plant, developed as a market-based response to creation of the PX, may qualify for an exemption without specific documentary evidence of negotiations for power sales.

marketplace. (ER 96 at pp. 71-72).

III. SUMMARY OF PARTIES' POSITIONS

In the present matter, Petitioner asserts that the Blythe Energy project is a market-based response to formation of the PX, which solicits energy bids on an hourly basis. (Exhibit 1). The project will sell some or all of its output in the competitive marketplace to the PX. Petitioner relies on the Commission's recent decisions granting NOI exemptions to other gas-fired merchant plants,¹⁴ and seeks confirmation that its project is also eligible for an exemption.

Since the PX only recently began operations,¹⁵ the assertion that hourly bids for energy sales constitute a "competitive solicitation or negotiation for new power resources" is a matter of statutory interpretation and Commission policy. In consideration of the issues raised in the Petition, the Committee requested Petitioner to respond to the following inquiries:¹⁶

1. Does Petitioner contend that the PX process constitutes a "competitive solicitation or negotiation?" If so, on what basis?
2. Provide evidence to establish that Petitioner's prospective project is "the *result* of a competitive solicitation or negotiation."
3. Describe the specific nexus between the particular project proposed by Petitioner and the PX's solicitations for "day ahead" and "hourly bids." How is the Blythe project anticipated to perform under both scenarios?
4. Is it Petitioner's position that its proposal to develop a merchant powerplant to

¹⁴ See footnote 13, *ante*.

¹⁵ The PX was slated to begin operations on January 1, 1998; however, the PX officially began the "competitive auction" for wholesale power producers on March 31, 1998. (See, Pub. Util. Code, § 355).

¹⁶ See, August 18, 1998, Notice of Committee Hearing.

sell energy through the PX creates an irrebuttable presumption that such proposal is the "result of a competitive solicitation or negotiation?"

5. Is Petitioner negotiating with any other potential power purchasers or power exchanges?
6. What is Petitioner's registration status at the PX? If Petitioner has not begun the registration process, what are Petitioner's plans regarding registration and negotiation for a "PX Participation Agreement?"
7. Identify Petitioner's principal corporate owners and/or other entities or individuals who are legally and financially responsible for the development, construction, and operation of the proposed project.
8. Describe Petitioner's experience and assets with regard to power generation acquisition, and powerplant development, ownership, and operation.
9. Describe the specific location in Riverside County where the project will be constructed.
10. Provide evidence describing the project components sufficiently to establish that the proposed facility is a natural-gas fired powerplant.
11. Provide evidence to establish that the proposed project can be developed and operated without the benefit of ratepayer support or guarantees.
12. Explain how Petitioner's negotiations will be affected by the Independent System Operator's "congestion" and "ancillary services" market activities.

Petitioner. Petitioner responded to these inquiries in its September 9th statement to the Committee. At the hearing, Petitioner sponsored sworn testimony¹⁷ in support of its responses and presented legal argument regarding the relationship between the proposed project and the PX.

In response to Question 1 (whether the PX process constitutes a "competitive solicitation or

¹⁷ Testimony was provided by Robert Looper, Vice President of Summit Energy Group and Project Manager for the Blythe Energy Powerplant Project.

negotiation"), Petitioner argued that although Section 25540.6 predates the PX, and the Legislature could not have anticipated market-based restructuring of the electric utility industry, it is reasonable to interpret the Act as providing an exemption from the NOI process for merchant projects that will sell their power in a competitive market. (Exhibit 2, p. 2) The PX is designed to provide a market for electricity with hourly prices available to consumers and power marketers. (*Ibid.*; 9/29/98 Reporter's Transcript [RT]: pages 15, 28). With visible price signals, wholesale and retail buyers have the ability to make efficient purchasing decisions and to affect market prices. (*Ibid.*)

In response to Question 2 (whether the Blythe Energy project is the "result of a competitive solicitation or negotiation"), Petitioner explained that the PX provides a mechanism for the sale of competitively priced power. The proposed project will sell power through competitive solicitations including those available through the PX, the forthcoming Arizona PX, and through other competitively solicited bilateral contracts. The project has been developed for baseload operation in direct response to the market-based restructuring of the electric utility industry, which provides broader opportunities to sell power on a competitive basis. (Exhibit 2, p. 3; RT: 27-28).

Regarding Question 3 (describe the nexus between the Blythe Energy project and the PX's solicitations for "day ahead" and "hourly bids"), Petitioner indicated that the project will utilize state-of-the-art technology that allows for quick starts and load following capability. (Exhibit 2, p. 3). These start-up times provide efficient operations on either day ahead or hourly bids, which are the basis for the competitive solicitations conducted by the PX. (*Ibid.*)

In response to Question 4 (whether Petitioner's proposal to develop a merchant plant and sell energy through the PX create an *irrebuttable presumption* that it is the result of a competitive solicitation or negotiation), Petitioner asserted that the hourly and daily auctions conducted by the PX are essentially competitive solicitations, and the market process amounts to a negotiation. (Exhibit 2, p. 4). If the PX process were not in place, Blythe Energy would not have developed

its present proposal. While Petitioner did not argue that this conclusion is *irrebuttable* in every case, Petitioner urged the Committee to follow the precedent established in previous NOI exemption cases. (*Ibid.*; RT: 18-19).

Regarding Question 5 (negotiations with other power purchasers or power exchanges), Blythe Energy has conducted extensive discussions with area utilities, industries, and organizations with power needs in the Blythe region. Interconnection with the Blythe substation provides access to several regional (Western Area Power Administration [WAPA] transmission service areas from Blythe, Imperial County, Phoenix, Lake Havasu City) and statewide markets (California and Arizona power exchanges), providing a solid market base of competitive opportunities to support the project. (Exhibit 2, p. 4; RT: 14.)

Regarding Question 6 (Petitioner's registration status with the PX), As a sole purpose energy generation project, Petitioner is not registered with the PX but will likely work through an existing energy marketing firm that is already registered. Alternatively, Petitioner may sell power directly to the PX by registering as a participant prior to commercial operation of the powerplant. (Exhibit 2, p. 5; RT: 22).

Regarding Questions 7 and 8, (identify Petitioner's principal corporate owners who are legally and financially responsible for the project; and describe Petitioner's experience in power generation acquisition and development), Blythe Energy is the wholly owned subsidiary of Summit Energy Group, which is a subsidiary of Summit Group International, Ltd., a Colorado corporation. Members of the Summit Group's Board of Directors include, *inter alia*, Donald Hodel, former Secretary of both the U.S. Department of Energy and the U.S. Department of the Interior, and William Clagett, former administrator for WAPA and the Bonneville Power Administration. (Exhibit 2, pp. 5-7). In addition to the Blythe Energy project, Summit Energy is currently involved in the development of six other gas-fired combined cycle powerplant projects across the country, with an anticipated cumulative output of over 2,000 MW. (*Id.*, p. 7; RT: 12).

Regarding Question 9 (location of the project), Petitioner indicated that the Blythe area was selected based on several site selection criteria, including access to transmission and natural gas lines, water availability, land use, and other factors. (Exhibit 2, p. 8). Three alternative sites near the City of Blythe have been identified and purchase options for one of those sites will be negotiated prior to the filing of an AFC for the project. (*Ibid.*; RT: 13-15, 20).

In response to Question 10 (provide evidence to establish that the project is designed as a natural gas-fired powerplant), Petitioner described the proposed project components which are typical of a state-of-the-art natural gas-fired powerplant. (Exhibit 2, pp. 10-12).

Regarding Question 11 (whether the project can be developed and operated without the benefit of ratepayer support), Petitioner declared that ratepayer guarantees are not available to privately owned merchant powerplant projects. (Exhibit 2, p. 13). The Blythe Energy project is a merchant plant which is sponsored by private entities not affiliated with any California regulated utilities. All economic costs of the project will be carried by Petitioner. (*Ibid.*; RT: 19).

Finally, in response to Question 12 (how Petitioner's negotiations will be affected by the ISO's congestion and ancillary services activities), Petitioner explained that the Blythe substation, owned by WAPA, has a single 161 kV line under ISO jurisdiction. The line is owned by Southern California Edison (SCE). Petitioner will work with SCE and the ISO as part of the Interconnection Study to determine the need to upgrade or improve the line and transformer capability. (Exhibit 2, p. 13; RT: 13). The project intends to provide many of the ancillary services identified by the ISO, including load following, VAR support, fast start, spinning reserve, and reserve margin through duct firing and other features. (*Ibid.*) Petitioner does not anticipate that ISO congestion or ancillary services would pose any problems for selling power into the PX or other markets. (*Ibid.*)

Staff. Staff agreed with Petitioner's assertions that the proposed merchant project is a natural gas-fired powerplant that meets the statutory test for being the result of a competitive solicitation. (Exhibit 4). Staff reiterated Petitioner's view that existing Commission policy supports such a conclusion. (RT: 24-27). Further, Staff expressed the opinion that even if Petitioner sells power to other power exchanges or wholesale power purchasers, there is a high probability that such sales would be the result of competitive negotiations that would comply with the statutory requirements. (*Ibid.*)

IV. DISCUSSION

In light of the *La Paloma* Decision, Petitioner sought confirmation that previous Commission rulings regarding the Commission's interpretation of PRC, § 25540.6 would provide guidance in this case.¹⁸

The Committee's task in the present proceeding is to determine whether the Blythe Energy Powerplant Project fits within the statutory requirements for an exemption from the NOI review in accord with existing law and Commission policy.

The statutory requirements are specified in PRC, § 25540.6(a)(1):

(a) Notwithstanding any other provision of law, no notice of intention is required ... for any of the following:

(1)...a thermal powerplant which is the result of a competitive solicitation or negotiation for new generation resources and will employ natural gas-fired

¹⁸ In the *La Paloma* Decision, the Commission found that the creation of the PX, which promotes a competitive wholesale market, may be viewed as a continuing series of solicitations and negotiations which are of the type reasonably envisioned by the policy expressed in the *ER 94 Addendum* and PRC, § 25540.6(a)(1). (*La Paloma*, Order No. 98-0812-04, p. 15).

technology

This provision contains both technological and market entry qualifications. Blythe Energy's project is designed as a natural gas-fired combined cycle powerplant, nominally 400 MW in capacity.¹⁹ This meets the technological requirement of the statute. Therefore, the sole remaining matter for resolution is whether the project meets the market entry qualification, i.e. whether it is "the result of a competitive solicitation or negotiation for new generation resources."

The *La Paloma* case was the first request for an NOI exemption *after* the PX had begun operations. In *La Paloma* (a 3-2 Decision), the majority found it was not necessary to require signed (and thus negotiated) contracts or agreements, which were available in previous cases, as prerequisites to an NOI exemption. In the newly restructured marketplace, power sales may be negotiated with the PX on a real-time basis. It would be unrealistic, therefore, to require executed contracts or agreements in the context of the presently developing market created by AB 1890 since a power producer will not necessarily sell to a discrete consumer or utility but rather, through the PX, can effectively sell its power statewide. Evidence of contracts with individual customers are similarly unrealistic at the present time due to the evolving nature of electricity markets.

The *ER 94* Addendum anticipated the circumstances currently before us and directed a broad construction of the terms "competitive solicitation or negotiation" under Public Resources Code section 25540.6(a)(1) in order to advance declared legislative purposes.²⁰

¹⁹ The main power facilities will occupy a 12-acre parcel or power island that includes a set of combined cycle natural gas turbine generators, heat recovery steam generators with exhaust stacks equipped with SCR systems, steam turbines, and ancillary facilities. The project will interconnect with the Blythe substation, and the electricity will be transmitted through the existing distribution network. (Exhibit 2, pp. 10-12; RT: 13).

²⁰ In adopting the Addendum, the Commission was presumably aware of the ambiguities inherent in the statute which was amended by AB 1884 in 1993 during the pendency of the BRPU. (See footnote 7, *ante*) .

The NOI process was originally included in the Warren-Alquist Act in the early 1970's to: 1) provide an opportunity for the public to participate in planning new powerplant site locations; and 2) avoid significant expenditures by the regulated utilities for site purchase and engineering design prior to determining site feasibility. These concerns arose in the context of proposals to construct 500 MW to 2,000 MW coal-fired and nuclear powerplants which were controversial and had the potential of causing adverse environmental and public health impacts on surrounding communities.

In 1978, the NOI process was amended to exempt cogeneration projects under 300 MW, modifications of less than 300 MW to existing plants, projects less than 100 MW, and demonstration projects. By the early 1990's, when AB 1884 exempted gas-fired projects that are the result of competitive negotiations, the amendment reflected the trend toward competition to select new generation sources that use much cleaner and more efficient gas-fired technologies.²¹

At the present time, power producers are no longer subject to the solicitation process that existed under the BRPU that was addressed by AB 1884; rather, that process has been replaced by the competitive market established by AB 1890. Both statutes, however, were logically intended as steps toward the development of a competitive electricity market. We believe this goal must remain foremost when interpreting the overall statutory scheme.

AB 1890 established the PX to provide a "competitive auction," resulting in competitive market pricing at no risk to ratepayers. The Commission has previously found this auction consists of a series of virtually instantaneous negotiations in which power marketers compete with the

²¹ In the *ER 94* Addendum, the Commission confirmed this rationale in stating that " ...new natural gas-fired powerplants, subject to the stringent requirements of federal or local New Source Review rules, will be substantially cleaner than and will likely displace existing powerplants built decades earlier." (*ER 94* Addendum, p. 2).

lowest bids to be able to operate in the "day-ahead" and "hour-ahead" markets. (La Paloma, Order No. 98-0812-04, pp. 12, 15). Therefore, the Commission determined that the creation of the PX, which promotes a competitive wholesale market, should be viewed as a continuing series of solicitations or negotiations.

In previous decisions on NOI exemption petitions, the Commission considered evidence that a proposed project was developed as the result of informed business judgment, accompanied by a showing that negotiations - whether completed or prospective - were a part of that judgment. Informed business judgment anticipates the realities and economics of the restructured market and, under these circumstances, merchant facilities such as the Blythe Energy Powerplant Project will be developed to participate in the PX auction.²²

In this case, Petitioner is the wholly owned subsidiary of Summit Energy Group, an established company with significant experience and assets involved in power generation acquisition, development, ownership, and operation.²³ The Summit Group conducted a comprehensive search to target the project location to ensure project success.²⁴ Based on this uncontroverted evidence, we believe the record demonstrates the project's potential economic viability.

²² Petitioner asserted that its proposed powerplant is a "market-based response to formation of the [PX], which solicits energy bids on an hourly basis." (Exhibit 1). "The PX is a critical component to the success of any type of merchant plant in this [Blythe] area." (RT: 15, lines 19-21).

²³ See page 10, *ante*.

²⁴ Petitioner is involved in discussions with WAPA, local irrigation districts, and other local agency representatives to develop a solution for the anticipated need for increased loads in the Blythe/Yuma Area, and the accessibility of the area to both California's and Arizona's power exchanges. (RT: 13-15). Further, Petitioner's site selection criteria were satisfied by the accessibility of interstate high pressure natural gas (El Paso pipeline), existence of the Blythe substation, the availability of water (Colorado River flood plain area), and the area's air quality attainment status. (*Ibid*).

In following this rationale, we can conclude that the project, which anticipates participation in the competitive PX auction, is the result of a "competitive solicitation" within the meaning of the Section 25540.6. This view comports with the purposes of both Sections 25540.6 and AB 1890, i.e., to foster power production that is competitively priced and does not put ratepayers at risk. Accordingly, we find that Blythe Energy's project is the result of the competitive auction which is a continuing series of solicitations or negotiations.

In conclusion, we believe Petitioner has satisfied the market entry requirement of the statute. Petitioner has demonstrated sufficient indications of market viability to establish that the Blythe Energy Powerplant Project is the "result of a competitive solicitation or negotiation" within the meaning of Public Resources Code section 25540.6(a)(1), and, therefore, as a merchant powerplant project that will compete in the electricity market without the benefit of ratepayer support or guarantees, it is exempt from NOI requirements under this statutory provision.

V. ADDITIONAL RECOMMENDATION

In *La Paloma*, all five Commissioners agreed to continue reviewing NOI exemption petitions on a case-by-case basis while acknowledging that a natural gas-fired merchant plant, which does not put ratepayers at risk, would generally be eligible for an NOI exemption. In his Dissenting Opinion, Commissioner Moore raised concerns about the status of the review process, noting that the only policy direction on this issue appears in the *ER 94* Addendum. (*La Paloma*, Dissent, p. 4). While the case-by-case review *process* was continued in *ER 96*, it does not provide any further *policy* guidance on NOI exemptions. Commissioner Moore expressed his belief that the case-by-case review process, therefore, is the only provision of the *ER 94* Addendum to survive with the adoption of *ER 96*.²⁵ (*Ibid.*)

²⁵ Indeed, the case-by-case review process informed the Decision in *La Paloma* which did not establish an *irrebuttable presumption* standard to automatically exempt all merchant plants from NOI requirements. (*La Paloma*, pp.

Commissioner Moore also expressed concern that the beneficial aspects of the NOI would be lost if merchant plants are consistently exempted from NOI requirements under the guise of a case-by-case review process. (*La Paloma*, Dissent, p. 1, 4-5). Specifically, the Dissent questioned whether exempted merchant projects would avoid the comprehensive alternatives analysis required by the NOI. (*La Paloma*, Dissent, p. 4). The Dissent also argued that the exemption process tends to defeat important aspects of the NOI which provides a planning perspective for understanding larger questions of how the site selection criteria of competitive merchant projects will impact statewide reliability concerns and comply with the Commission's integrated assessment of need. (*Ibid.*)

The Committee believes that certain concerns raised in the Dissent have been addressed above. To reiterate, however, it should be noted that the scope of the alternatives analysis required for exempted projects is included in the statute. Section 25540.6(b) of the Warren-Alquist Act, which imposes an alternatives analysis on exempted natural gas-fired merchant plants that reflects the site selection review required by the NOI, states:

Projects exempted from the notice of intention requirement ...shall include, in the application for certification, a discussion of the applicant's site selection criteria, any alternative sites that the applicant considered for the project, and the reasons why the applicant chose the proposed site. (PRC, § 25540.6(b)).

We also believe the "need" element was previewed in *ER 94*. There, the Commission recognized that one of the major reasons for tightly controlling "need" for new facilities in the past was because California's ratepayers were penalized for the utilities' investments in unsuccessful projects. Previous need criteria assumed that " ...ratepayers were required to shoulder the financial risks of new powerplants only if the plants (1) were necessary to 'keep the lights on'; or (2) would lower total system costs in the long run." (*ER 94*, pp. 131-132). "[T]he need to protect ratepayers from unneeded powerplants arises in part from ...utility regulation ...[but]... in

an unregulated competitive market customers do not bear such costs."

(*Id.*, p. 132). Consequently, when facilities are financed by investors who take these risks instead of captive utility ratepayers, the state has much less reason to impose a strict limitation on the amount of capacity that can be built or can exist in the market at any given time.²⁶

As stated in *La Paloma*, this view was extended in *ER 96* which continued the "hands-off" approach by adopting a need test that simply set the need determination cap at 6,737 MW. Recognizing that subsequent *ER*'s could be delayed or eliminated, *ER 96* stated that revisions to the need test may be necessary during its pendency. (*ER 96*, p. 73). In light of the several new projects presently before the Commission, the 'need' cap may soon be reached. Given this concern and the issues raised by Commissioner Moore, the Commission assigned a team to specifically review the continued feasibility of the need cap established in *ER 96*.

Since project developers carry the financial risk of developing their merchant projects, and since we have previously found that power sales to the PX or other wholesale and retail marketers constitute a "competitive solicitation or negotiation," the case-by-case review process dictated by the *ER 94* Addendum and *ER 96* can be streamlined. We recommend that the Commission adopt a *rebuttable* presumption standard that all gas-fired merchant projects will be deemed exempt in the absence of contravening evidence. Project proponents seeking NOI exemptions need only establish that their powerplants meet the statutory requirements, i.e., natural gas-fired and the "result of competitive solicitations or negotiations" by participation on the California PX and/or other power exchanges and/or by showing agreements with wholesale and retail power purchasers.

²⁶ It should be noted that the NOI process contemplates that alternative sites may be proposed from an inventory of sites previously approved or examined by the Commission (PRC, § 25503); and if a project proponent fails to find any acceptable site, the Commission has the authority to designate a feasible site for providing needed generating capacity. (PRC, § 25516). In the deregulated electricity marketplace, the continued practical applicability of these provisions is questionable.

To achieve this, we propose that the Commission declare the following findings and conclusions in this Decision are *precedential*: Findings and Conclusions 1 through 6 listed at page 19 of this Decision. Petitions filed by gas-fired merchant projects for NOI exemptions, and supported by accompanying affidavits, shall be reviewed for conformance with the issues addressed in this Decision²⁷ and processed expeditiously, possibly without the necessity for a Committee Hearing, to allow project proponents to proceed with their AFC's.

We will thus continue to handle requests for NOI exemptions on a case-by-case basis and through the investigative process set forth at Sections 1230 et seq. of the Commission's regulations as presently required. (Cal. Code of Regs., tit. 20, § 1230 et seq.). In the interest of further expediting these cases, however, we recommend that the Commission designate the Energy Facility Siting Committee to process all NOI exemption petitions in order to shorten the time between filing the petition and Committee assignment. (Cal. Code of Regs., tit. 20, § 1230 (b)). Further, the Committee may schedule hearings before the full Commission, without first conducting a hearing at the Committee level when the evidence is submitted by affidavits. (Cal. Code of Regs., tit. 20, § 1232(2)).

We, therefore, recommend that the Commission adopt the portions of this Decision, as specified above, as a *Precedential* Decision pursuant to Section 11425.60 of the Administrative Procedure Act. (Govt. Code § 11425.60).

V. FINDINGS and CONCLUSIONS

Based on the totality of the record, we make the following findings and conclusions:

²⁷ As direction to future Petitioners, a sufficient record is likely to be established by fully answering Inquiries 3 (baseload and peaking capabilities), 5, 6, 7, 8, 9 (site location and site selection criteria), 10, 11, and 12 listed at pages 7-8 of this Decision, supported by affidavits containing written testimony and executed under penalty of perjury by one or more principals representing the project proponent.

- 1) The Commission adopted an "Addendum to the 1994 Electricity Report" on February 14, 1996.
- 2) This Addendum sets forth policies and procedures which apply to the interpretation of Public Resources Code (PRC) section 25540.6(a)(1) and are, on a case-by-case basis, specifically applicable to individual Petitions seeking an exemption from the Notice of Intention (NOI) provisions of PRC, § 25502.
- 3) The Commission adopted the 1996 Electricity Report (*ER*) which continued the policies set forth in *ER 94* and in the Addendum.
- 4) The California Power Exchange (PX) was created by AB 1890 to provide an efficient "competitive auction" open to all power producers, resulting in competitive market pricing at no risk to ratepayers. (Pub. Util. Code, § 355).
- 5) The creation of the PX, which promotes a competitive wholesale market, may be viewed as a continuing series of solicitations and negotiations, which are of the type reasonably envisioned by the policy expressed in the Addendum and PRC, § 25540.6(a)(1).
- 6) The PX market, which began the competitive auction on March 31 1998, replaced the solicitation process that existed under the Biennial Report Plan Update (BRPU).
- 7) Petitioner filed a Petition seeking an exemption from the Notice of Intention (NOI) process in accord with the policy guidance set forth in the Addendum and in compliance with the requirements of Title 20, California Code of Regulations, sections 1230, et seq.
- 8) Petitioner proposes to construct a natural gas-fired combined cycle powerplant, nominally rated at 400 MW.
- 9) The powerplant will be located near the City of Blythe in Riverside County, a few miles west of the California-Arizona border.
- 10) The development of Petitioner's proposed powerplant as a merchant project does not put ratepayers at risk.
- 11) Petitioner is the wholly owned subsidiary of Summit Energy Group, Ltd., a subsidiary of Summit Group International, a corporation headquartered in Colorado. In addition to the Blythe Energy Powerplant Project, Summit Energy Group is currently involved in the development and operation of several gas-fired power plant projects in different states, with an anticipated cumulative output of over 2,000 MW.
- (12) The proposed powerplant project is a market-based response to the creation of the PX,

and will be operated to sell some or all of its electricity output to the PX.

- (13) Petitioner has access to the PX market through existing energy marketing firms which are registered with the PX or, in the alternative, Petitioner will sell power directly to the PX upon registration as a participant prior to commercial operation of the project.
- (14) Petitioner has demonstrated sufficient indications of market viability to establish that the project is the "result of a competitive solicitation or negotiation."

We conclude, therefore, that Blythe Energy's proposed powerplant project is the "result of competitive solicitation or negotiation" for the sale of its electric power. Under these circumstances, and in light of the factors mentioned above and discussed elsewhere in this Decision, the prospective Blythe Energy Powerplant Project qualifies for an exemption from the Notice of Intention as set forth in Public Resources Code section 25540.6(a)(1).

Dated: _____

ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

ROBERT A. LAURIE
Commissioner and Presiding Member
Energy Facility Siting Committee

DAVID A. ROHY, Ph.D.
Vice Chair and Associate Member
Energy Facility Siting Committee

APPENDIX A

EXHIBIT LIST

STATE OF CALIFORNIA

**Energy Resources Conservation
and Development Commission**

In the Matter of)	
)	Docket No. 98-SIT-2
Blythe Energy, LLC)	
Request for Jurisdictional)	
Determination)	
_____)	

EXHIBIT LIST

<u>Number</u>	<u>Exhibit</u>
1	Document entitled, "Petition of Blythe Energy, LLC," dated July 23, 1998. Identified and received into evidence on Tuesday, September 29, 1998.
2	Document entitled, "Petition of Blythe Energy, LLC, Response to Energy Facility Siting Committee Inquiries 1 through 12," dated September 10, 1998. Identified and received into evidence on Tuesday, September 29, 1998.
3	Resume of Robert Looper, P. E. Identified and received into evidence on Tuesday, September 29, 1998.
4	Document entitled, "Energy Commission Staff Statement," dated September 8, 1998. Identified and received into

evidence on Tuesday, September 29, 1998.

APPENDIX B

PROOF OF SERVICE LIST

STATE OF CALIFORNIA

State Energy Resources Conservation
and Development Commission

In the Matter of:) Docket No. 98-SIT-2
)
Blythe Energy, LLC) **PROOF OF SERVICE**
Petition for Jurisdictional Determination) [Rev. 10/21/98]
_____)

I, SANDRA M. HARRIS declare that on OCTOBER 21, 1998, I deposited
copies of the attached NOTICE OF COMMISSION HEARING -and- COMMITTEE
PROPOSED DECISION in the United States
mail in Sacramento, CA with first class postage thereon fully prepaid and addressed to
the following:

PETITIONER

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Greystone
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Counsel for Petitioner:

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DOCKET UNIT

(Original and 12 Copies Required)

CALIFORNIA ENERGY COMMISSION
DOCKET UNIT, MS-4
Attn: Docket No.: 98-SIT-2
1516 Ninth Street
Sacramento, CA 95814-5512

ATTACHMENT A

Interested Individuals, Organizations and
Businesses *(See next page)*

I declare that under penalty of perjury that the foregoing is true and correct.

[signature]

ATTACHMENT A

Interested Individuals, Organizations and Businesses

City of Blythe
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Blythe, CA 92225

County of Riverside
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Land Management Agency/Planning Dept.
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Mojave Desert Air Quality Management
District
Mr. Chris Collins, Supervising Air
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Attachment A, (Cont.)

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Calpine Corporation
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* * * *

ENERGY COMMISSION INTERNAL DISTRIBUTION LIST ONLY!

Parties **DO NOT** mail to the following individuals. The Energy Commission Docket Unit will internally distribute documents filed in this case to the following:

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